[illegible]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 109.

AUGUST STREITWOLF, Plaintiff in Error,

vs.

ELIZABETH STREITWOLF,

Defendant in Error.

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 109.

AUGUST STREITWOLF, PLAINTIFF IN ERROR,

vs.

ELIZABETH STREITWOLF, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

On page 4 of defendant's brief the case of *Grover & Baker Sewing Mch. Co. vs. Radcliffe* is cited. The inquiry there was as to the domicile of a corporation. This was with reference to the proper service of process, which under the cases, it is admitted, can be inquired into.

The reason for the right to contradict the fact of service of process, and in the case cited the domicile of the corporation, appears to be that such fact is not put in issue by the pleadings; that proof of service is a mere incidental fact and not an issue in the cause; that it could not be controverted without an appearance by the defendant, which appearance would *ipso facto* put an end to the question as to the jurisdiction over the defendant.

Not so, however, is the fact of domicile of the plaintiff. That is alleged in the pleading or declaration and is a fact

to be proved in the case before judgment can pass, and is one of the issues tendered in the cause which the court is bound to decide.

There exists no other tribunal for the settlement of this fact.

It is also said (p. 4) that residence alone enables the court to dispense with service within the territorial jurisdiction of the court.

If adjudged residence must precede the issue of process to be constructively served, then such process could never issue, nor could the determination of residence be effectively adjudged until such process had been issued and returned.

It is submitted that on the facts of the case the finding of the court of North Dakota as to domicile is not without proper and firm support. The evidence is such that a court, to put it in its most unfavorable aspect for Mr. Streitwolf, might decide either way.

The quotation on page 11, that the domicile must be "*free from suspicion*," is manifestly bad law. It must be the domicile or not.

On page 14 the proposition is advanced by counsel that a decree for divorce may be operative within and inoperative without the jurisdiction. Let this be admitted, then the decree of the New Jersey court has not given the Dakota decree that faith and credit which the Constitution requires. It has adjudged that the Dakota decree is wholly void. Assuming that it was originally valid in North Dakota, then the parties, having appeared in the New Jersey suit, are concluded by the findings of the New Jersey court, even in North Dakota. In the event that Mr. Streitwolf was the owner of lands there and desired to sell them, he would

have a right to do so free from his wife's inchoate dower, because the North Dakota decree had dissolved the marriage; but the New Jersey decree would prevent him from asserting or claiming any benefit of the North Dakota decree. So the New Jersey court has failed to give the foreign decree the full faith and credit which it is entitled to receive, and has deprived Mr. Streitwolf of his constitutional right.

In any event, the New Jersey court has decided too much and its decree is too far-reaching. (See Judge Pryor's very forcible remarks in *Davis vs. Davis, 2 N. Y. Miscel. Rep., 549.*)

There can be no diminution of Mr. Streitwolf's constitutional right, no matter how small. The New Jersey decree has not acknowledged the foreign findings, even to the extent of being good in its own territory.

On page 18 defendant contends that the marriage relation is a *joint status of two persons*, and must be dealt with as an entirety.

The cases are clear that husband and wife may have separate domiciles. If, then, the State has the right to declare the status of its citizens and not the status of the citizens of another State, divorce is impossible if the domiciles are separate. So counsel would have it. But it amounts practically to a denial of the State's rights in regard to its citizens. In support thereof he states: "There cannot be a husband without a wife," &c. That is conceded.

But, from the very nature of the relation, the argument operates against him, because the jurisdiction of the State cannot be gainsaid from the fact that it may incidentally reach beyond the territorial limits thereof.

It cannot be said that the State's power is gone, because of necessity it reaches beyond its limits of territory.

The language of the Constitution is broad enough to cover suits in divorce.

Why should they, by construction, be left out of its reach?

Its design was to promote uniformity (*Huntington vs. Attrill, 146 U. S., 684*).

Surely no subject requires uniformity and certainty more than divorce. It should not be trusted to the caprice of comity. This court should settle the question.

WILLARD P. VOORHEES,
ROBERT ADRAIN,
Counsel for Plaintiff in Error.